

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA,)	
)	
Plaintiff,)	
)	
v.)	Case No. 05-cv-329-GKF(PJC)
)	
TYSON FOODS, INC., et al.,)	
)	
Defendants.)	

**STATE OF OKLAHOMA'S MOTION IN LIMINE TO PRECLUDE
EXPERT TESTIMONY OF DEFENDANTS' WITNESS WAYNE M.
GRIP AND INTEGRATED BRIEF IN SUPPORT THEREOF**

Plaintiff, the State of Oklahoma ("the State"), pursuant to Fed. R. Evid. 104 and 702, and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), respectfully moves this Court for an order in limine precluding the expert testimony of Defendants' witness Wayne M. Grip regarding the volume of sediments "relocated" in the Illinois River channel. As detailed below, Mr. Grip lacks sufficient qualification to offer expert opinion on this topic, his methodology in quantifying the volume of "relocated" sediments is unreliable, and because he cannot relate the movement of sediments to the movement of nutrients in the Illinois River any such opinion is in any event irrelevant.

I. Facts

Mr. Grip has a B.S. degree in geology. *See* Ex. 1 (Grip Depo., 9:3). He has no degree in fluvial geomorphology, has not published any peer-reviewed articles in geology or geomorphology, has no certifications as a geologist, and is not a member of any professional geological association or group. *See* Ex. 1 (Grip Depo., 22:12-15, 22:22-23:6, 82:5-19).

Despite this limited background, Mr. Grip is being proffered by Defendants to offer expert opinion on aspects of fluvial geomorphology -- namely the volume of sediments "relocated" in the Illinois River channel. *See* Ex. 2 (Grip January 2009 Rpt., p. 4).

Mr. Grip's opinions on the volume of sediments "relocated" in the Illinois River channel from Lake Frances to Lake Tenkiller are based upon his interpretations of aerial photography taken by others from an altitude of 3000 feet. *See* Ex. 1 (Grip Depo., 96:2-97:21, 99:4-5). Significantly, Mr. Grip did not do any onsite investigations or measurements or research relevant scientific literature to confirm the accuracy of his interpretations. *See* Ex. 1 (Grip Depo., 42:9-23).

When asked if the methodology he employed in reaching his opinion regarding the amount of sediments that go into a river system has ever been peer reviewed, Mr. Grip replied that "I do not know if it has or not" *See* Ex. 1 (Grip Depo., 119:7-11). Mr. Grip then cited to floodplain mapping work he had done, but later admitted that that work measured how much water could move through a floodplain, not the amount of sediment moving through the floodplain. *See* Ex. 1 (Grip Depo., 119:11-120:6).

Finally, Mr. Grip testified that he has not looked at any studies regarding sedimentation or channel scour in the Illinois River, that he does not know how far downstream sediments eroded from the banks of the Illinois River go, and that from his work he cannot tell the difference between sedimentation and nutrient transport. *See* Ex. 1 (Grip Depo., 121:11-16, 121:25-122:4, 124:3-8).

II. Legal Standard

Federal Rule of Evidence 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as

an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Thus, "Fed. R. Evid. 702 imposes on the trial judge an important 'gate-keeping' function with regard to the admissibility of expert opinions." *Ralston v. Smith & Nephew Richards, Inc.*, 275 F.3d 965, 969 (10th Cir. 2001). As an initial matter, the court must determine the expert is qualified by "knowledge, skill, experience, training, or education" to render an opinion. *Id.* "It should be borne in mind that the issue with regard to expert testimony is not the qualifications of a witness in the abstract, but whether those qualifications provide a foundation for a witness to answer a specific question." *In re Williams Securities Litigation*, 496 F. Supp. 2d 1195, 1232 (N.D. Okla. 2007) (internal quotations omitted). An expert's qualifications must be both adequate in a general, qualitative sense and specific to the matters he proposes to address as an expert. *See id.*

As explained in *In re Williams Securities Litigation*, 496 F. Supp. 2d at 1195:

[I]t should be borne in mind that "[t]he issue with regard to expert testimony is not the qualifications of a witness in the abstract, but whether those qualifications provide a foundation for a witness to answer a specific question." *Berry v. City of Detroit*, 25 F.3d 1342, 1351 (6th Cir. 1994), *cert. denied*, 513 U.S. 1111, 115 S. Ct. 902, 130 L. Ed. 2d 786 (1995). *See also*, *Wheeling Pittsburgh Steel Corp. v. Beelman River Terminals, Inc.*, 254 F.3d 706, 715 (8th Cir. 2001) ("To begin with, we agree with the district court that Dr. Curtis . . . easily qualifies as an expert under Federal Rule of Evidence 702. The real question is, what is he an expert about?") and *Westfed Holdings, Inc. v. United States*, 55 Fed. Cl. 544, 571 (2003), *rev'd in part on other grounds*, 407 F.3d 1352 (Fed. Cir. 2005). Thus, on the issue of expert qualifications, *Ralston* and like cases establish that the qualifications of the proposed expert are to be assessed only after the specific matters he proposes to address have been identified. The controlling Tenth Circuit cases, exemplified by *Ralston*, establish that the expert's qualifications must be both (i) adequate in a general, qualitative sense (i.e., "knowledge, skill, experience, training or education" as required by Rule 702) and (ii) specific to the matters he proposes to address as an expert.

Next, the court must ensure that the scientific testimony being offered is "not only relevant, but reliable." *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993).¹ "To be reliable under *Daubert*, an expert's scientific testimony must be based on scientific knowledge" *Dodge v. Cotter Corp.*, 328 F.3d 1212, 1222 (10th Cir. 2003). The Supreme Court has explained that the term "scientific" "implies a grounding in the methods and procedures of science." *Daubert*, 509 U.S. at 590. Likewise, it has explained that the term "knowledge" "connotes more than subjective belief or unsupported speculation." *Id.* Thus, "in order to qualify as 'scientific knowledge,' an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation -- *i.e.*, 'good grounds,' based on what is known." *Id.*

The Supreme Court has set forth four non-exclusive factors that a court may consider in making its reliability determination: (1) whether the theory or technique can be (and has been) tested, *id.* at 593; (2) whether the theory or technique has been subjected to peer review and publication, *id.*; (3) the known or potential rate of error and the existence and maintenance of standards controlling the technique's operation, *id.* at 594; and (4) whether the theory or technique has general acceptance in the scientific community, *id.* The inquiry is "a flexible one." *Id.*; *see also id.* at 593 ("[m]any factors will bear on the inquiry, and we do not presume to set out a definitive checklist or test"); *Dodge*, 328 F.3d at 1222 ("the list is not exclusive"). "The focus [of the inquiry]. . . must be solely on principles and methodologies, not on the conclusions that they generate." *Daubert*, 509 U.S. at 595.

¹ The Supreme Court held in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), that the gatekeeping function set out in *Daubert* applies not only to expert testimony based on scientific knowledge, but also expert testimony based upon technical or other specialized knowledge -- *i.e.*, it applies to all expert testimony.

To be relevant, the testimony must "assist the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702. This consideration has been described as one of "fit." *See Daubert*, 509 U.S. at 591. "'Fit' is not always obvious, and scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes." *Id.*

In sum, "[t]he objective of [the gatekeeping] requirement is to ensure the reliability and relevancy of expert testimony. It is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire*, 526 U.S. at 152.

Finally, the party proffering the expert scientific testimony bears the burden of establishing admissibility under the Federal Rules of Evidence and *Daubert*. *See Ralston*, 275 F.3d at 970 fn. 4.

III. Argument

First, given his limited educational and professional background in geology and geomorphology, *see* Ex. 1 (Grip Depo., 9:3, 22:12-15, 22:22-23:6, 82:5-19), Mr. Grip is simply not qualified to offer expert opinion on the volume of sediments "relocated" in the Illinois River channel. *See, e.g., In re Williams Securities Litigation*, 496 F. Supp. 2d at 1195.

Second, given that Mr. Grip could not testify that the methodology he employed to make his determination as to the volume of sediments "relocated" in the Illinois River has ever been peer reviewed, *see* Ex. 1 (Grip Depo., 119:7-11), and that he did not do any onsite investigations or measurements to confirm the accuracy of his interpretations, *see* Ex. 1 (Grip Depo., 42:9-23), Mr. Grip's methodology is not reliable. *See, e.g., Daubert*, 509 U.S. at 590-95; *Dodge*, 328 F.3d at 1222.

And third, given that Mr. Grip cannot relate the movement of sediments to the movement of nutrients in the Illinois River, *see* Ex. 1 (Grip Depo., 121:11-16, 121:25-122:4, 124:3-8), Mr. Grip's opinions as to the volume of sediments "relocated" in the Illinois River are in any event irrelevant. *See, e.g., Daubert*, 509 U.S. at 591.

IV. Conclusion

WHEREFORE, in light of the foregoing, this Court should enter an order in limine precluding the expert testimony of Defendants' witness Wayne M. Grip regarding the volume of sediments "relocated" in the Illinois River channel.

Respectfully Submitted,

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